Nos. 80-54 and 80-5049

In the Supreme Court of the United States

OCTOBER TERM, 1980

ITT GILFILLAN, a Division of International Telephone and Telegraph Corporation, a corporation,
Petitioner,

vs.

CLIFFORD E. CLAYTON,
Respondent.

CLIFFORD E. CLAYTON,
Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL NO. 509,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amicus Curiae of the Chamber of Commerce of the United States

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Brief Amicus Curiae of the Chamber of Commerce of the United States

I.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of over 3,700 state and local chambers of commerce and trade and professional associations, and has a membership in excess of 95,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents its member-employers in important labor relations matters vitally affecting their interests before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

This case presents issues that are of importance to the business community, to employers and employees, and to the basic principles of our national labor policy. Large and small employers throughout this Nation will be affected by the Court's decision in this case.

The Chamber, with the consent of all parties, respectfully submits this brief in support petitioner ITT Gilfillan in No. 80-54 and respondent United Auto Workers in No. 80-5049.

II.

PRELIMINARY STATEMENT

A. Statement of the Case

Following termination of his employment for violation of company work rules, Clifford E. Clayton filed a timely

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1. *See, e.g., Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 100 S.Ct. 2844, (1980); *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976); *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

grievance in accordance with the procedures of the collective bargaining agreement then in effect between his employer, ITT Gilfillan (hereinafter, the "Company"), and his bargaining representative, Local 509, United Auto Workers (hereinafter, the "Union"). (A.22; A.P.1-4)[2] The Union carried the grievance through the third and final step of the grievance procedure and requested arbitration. (A.22, 32-33; A.P.4) On the basis of its own investigation, including interviews of two eye witnesses, the Union later withdrew its request for arbitration and so notified Clayton in writing. (A.22, 78-79; A.P.4-5)

At that point, an internal union appeals procedure was available to Clayton through which he could have challenged the Union's decision not to take his grievance to arbitration. (A.64-77; A.P.5) That procedure gave each member the right to appeal to the general membership of the Local "any action, decision or penalty of [the Local] or of any official or representative of that body. . . ." U.A.W. Constitution, Art. 33, §§ 1-2 (1974). (A.69-70) If not satisfied with the decision of the Local, the member could appeal further to the International Executive Board and ultimately to either the Constitutional Convention Appeals Committee of the International Union or to a Public Review Board. *Id.*, Art. 33, §§ 3-11. (A.70-77)

Clayton was familiar with the Union's appeals procedure and was specifically advised by the Union at the time it decided not to take his grievance to arbitration that he could appeal that decision through these procedures. (A.P. 6-8) Clayton, however, did not attempt to use the appeals procedure. (A.23; A.P.5-6) Instead, some six months later, he brought suit in federal district court against both the Company and the Union. (A.3-10, A.P.4-5; Petitioner Clayton's Opening Brief at 4) Against the Company, he alleged

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2. "A." refers to the Joint Appendix filed herein. "A.P." refers to the Appendix to the Petition for Certiorari filed by ITT (80-54).

that his termination violated the collective bargaining agreement. (A.4) Against the Union, he alleged a breach of the duty of fair representation as a result of the Union's "discriminatorily failing and refusing to protest and grieve [his] wrongful termination. . . ." (A.6)

Both the Company and the Union raised as affirmative defenses Clayton's failure to exhaust his internal union remedies. (A.12, 18) Following trial on this issue, the district court concluded that the internal union procedures could have provided adequate relief, that Clayton's failure to exhaust these available remedies was not excused, and that his action against both the Union and Company was therefore barred. (A.P.14-16)

On appeal, the Ninth Circuit affirmed the dismissal of the Union but reversed the dismissal of the Company. *Clayton v. ITT Gilfillan,* 623 F.2d 563, 571 (9th Cir. 1980). As to each, the court measured the adequacy of the internal union remedies according to the standard of what relief a court could provide. (623 F.2d at 566-67) Since a successful court action against the Union could yield only money damages, a remedy the internal union procedures could provide as well, the court concluded that these procedures were adequate *vis-a-vis* the claims against the Union. (623 F.2d at 566) However, since a successful court action against the Company could yield reinstatement, a remedy the internal union procedures could *not* provide, the court concluded that these procedures were *not* adequate *vis-a-vis* the claims against the Company. (623 F.2d at 567, 569) Accordingly, the court held that Clayton's suit against the Union was barred by his failure to exhaust internal union remedies, whereas his suit against the Company was not. (623 F.2d at 571)

B. Summary of Argument

By narrowly restricting the defense of failure to exhaust intraunion remedies in actions on the collective bargaining

agreement, and by making the defense available to unions but not employers, the court below has adopted a rule that seriously undermines important tenets of our national labor policy and imposes unfair and inequitable burdens upon employers. In place of this unnecessarily restrictive approach, *Amicus* urges the Court to adopt an alternative rule that better serves the national labor policy, avoids unfairness to employers, and provides proper safeguards for the interests of individual employees.

Central to our national labor policy is the private resolution of labor disputes, including claims arising under collective bargaining agreements. Where such disputes involve grievances, this policy also rests on the unique nature of collective bargaining agreements - - documents for industrial self governance that are necessarily incomplete - - and on the essential role played by the grievance and arbitration process in the ongoing perfection and elaboration of these basic documents. To ensure that the rules developed to refine the parties' relationship remain their own, our national labor policy mandates that only in the most exceptional circumstances should judges rather than the parties themselves or their chosen arbitrator perform this delicate task. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-583 (1960).

To effectuate this goal, the contract exhaustion doctrine has evolved to preclude unnecessary judicial consideration of employee claims arising under collective bargaining agreements. According to this doctrine, an employee may not go directly to court where there is an alleged breach of the collective bargaining agreement. Instead, the employee must first present the grievance to the union, which has broad discretion to determine whether and how, in the best interests of all employees, the claim should be resolved. In the unusual case where the parties themselves cannot resolve the dispute, the union determines whether to take

the grievance to arbitration, and where arbitration does occur, the decision of the arbitrator is ordinarily final. Only if excused from this exhaustion requirement, as by a breach of the union's duty of fair representation, may the employee place the matter before the judiciary instead. *See Hines v. Anchor Motor Freight,* 424 U.S. 554 (1976); *Vaca v. Sipes,* 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965).

Closely analogous to contract exhaustion is the requirement that union members exhaust their internal union appeals before seeking redress in the courts against their union. Even apart from its relation to contract exhaustion, this doctrine, too, serves important policy goals. By providing unions the opportunity to resolve disputes internally, without judicial interference, it strengthens union democracy and promotes a more stable and responsible bargaining relationship. Congress has recognized the importance of these goals, while at the same time protecting union members from prejudicial delay, by authorizing the judiciary to require union members "to exhaust reasonable hearing procedures" for up to four months "before instituting legal or administrative proceedings. . . ." § 101(a)(4), Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4). *See NLRB v. Marine & Shipbuilding Workers,* 391 U.S. 418 (1968).

The contract exhaustion doctrine and the intraunion exhaustion doctrine are ordinarily distinct - the former pertaining to grievances under the bargaining agreement and the latter to internal union affairs. Where, however, the union member complains that the union has wrongfully failed to pursue a grievance, the two doctrines coalesce at each of several levels. First, at the procedural level, the issues to which the doctrines relate become closely interrelated. In order to maintain an action against the employer for breach of the bargaining agreement - - an issue subject

to contract exhaustion - - the employee must first show that the union breached its duty of fair representation - - an issue subject to intraunion exhaustion. Further, where the union maintains that it decided not to pursue the grievance because it lacked merit - - the most typical case - - the contract issues and the intraunion issues become interrelalated on the substantive level as well.

Even more important, though, is the interrelation of the two exhaustion doctrines at the policy level. Just as the contract exhaustion doctrine strengthens the union by providing it broad discretionary control over grievances, so too does intraunion exhaustion promote private resolution of contract disputes. Thus, if the employee must appeal the union's decision not to pursue the grievance before going to court against either the union or the employer, the union will have an opportunity, otherwise lost, first to satisfy the employee that its action was correct, thus averting litigation. Conversely, if the union determines on appeal that it mishandled the grievance, litigation is again likely to be averted, because both the union and the employer will now have added incentive to pursue private resolution: the union because it has determined its prior action to be in error and the employer both to avoid litigation and because the issue is now likely to have larger consequences for the parties' ongoing bargaining relationship. If the union does not reverse itself, or if the employer nonetheless refuses to consider the grievance, the employee of course will then be free to seek redress in the courts. Given a reasonable limitation upon the length of time that intraunion procedures must be pursued, such as the four-month limitation contained in Section 101(a)(4), either resolution of the employee's claim will have come promptly, or the employee will be able to initiate a court action without prejudicial delay.

Requiring the pursuit of intraunion appeals before resorting to the courts thus complements the contract exhaustion doctrine and thereby serves important national policies.

The collective bargaining process is encouraged, union responsibility is promoted, and disputes are privately resolved - both between the member and the union and between the union and the employer. Further, this occurs in a manner that not only avoids unfairly burdening the employee, but indeed increases the likelihood of a fair and prompt resolution of the employee's claim.

By contrast, the rule of the Ninth Circuit disserves each of these goals. That rule would require intraunion exhaustion only in two narrow and infrequent circumstances: where the union appeals procedure can formally reinstate the grievance or where the union appeals procedure can award a court-like remedy. Further, the Ninth Circuit would apply this rule to the employer and the union separately, thus leading to the recognized "anomaly" of the present case where the union is dismissed and the employer is not. *Clayton v. ITT Gilfillan, supra,* 623 F.2d at 566-571.

The Ninth Circuit here errs, first because it fundamentally misconceives the role of intraunion exhaustion. Intraunion procedures are not substitutes for either the courts or the contract grievance procedure, and they should not be required to provide the same kind of relief. Rather, their role in this context is to *facilitate* private resolution, either by the parties themselves or by their chosen arbitrator. So long as an appeal may be taken from the union's decision to drop the grievance, that is sufficient for this role. If such resolution is not forthcoming in a reasonable time (and this is why it need not be guaranteed), then the employee is free to go to the courts, without having suffered prejudicial delay.

Beyond being unnecessary to promote private resolution of disputes, the strictures placed upon intraunion procedures by the Ninth Circuit actually disserve that goal. Very few intraunion procedures would satisfy either of the Ninth

Circuit's criteria to qualify for exhaustion. As a consequence, the potential for private resolution present in those procedures that can address whether the grievance was properly dropped, but can neither award court-like relief nor guarantee reinstatement of the grievance, would be lost. Those cases would go instead to the courts, despite the consensus that judicial intrusion into the bargaining relationship should be the exception and not the rule.

Further, to apply any such criteria so as to dismiss the union but not the employer creates an actual disincentive for private resolution. With the union out of the case, the action against the employer becomes substantially easier to maintain, because on the key and threshold issue of the breach of the duty of fair representation, the union is not required to defend itself. It is the employer that must assume this defense, with neither firsthand access to the evidence nor with incentive for the union to cooperate. As a consequence, the employee stands to gain a decided advantage in court by deliberately not pursuing the intraunion appeal, an outcome clearly counter to the policies supporting both intraunion and contract exhaustion.

For all these reasons, then, the decision of the Ninth Circuit should be rejected. By employing an unduly formalistic approach without proper regard for the overall structure of our national labor policy, it unnecessarily restricts resort to intraunion procedures and does so in a manner that actually disserves that policy. In place of this restrictive rule, *Amicus* respectfully urges the Court to require, as a precondition to suit against either the employer or the union, the reasonable pursuit (for up to four months) of intraunion appeals wherever such procedures have the capacity to address the union's handling of the grievance. Given the effect upon the overall bargaining relationship, the importance of private resolution, the limited burden this rule places upon the employee, and the potential cost

to stable labor relations of the alternative, no less than this should be required before permitting the courts to intervene in the collective bargaining relationship.

Accordingly, *Amicus* respectfully urges the reversal of the Ninth Circuit's decision with regard to the Company. The Union's procedures involved here had the requisite capacity to entertain an appeal from the decision not to pursue the grievance, and Clayton had notice of those procedures. His failure, therefore, even to attempt such private resolution should preclude a lawsuit against either the Union or the Company.

III.

ARGUMENT

A. National Labor Policy Favors Private Resolution of Disputes

At the root of our national labor policy is a decided and strong preference for the private resolution of labor disputes, including those arising under collective bargaining agreements. Congress has made this preference explicit, declaring in Section 203(d) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 173(d), "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . ." As the Court recognized in *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960), "[The congressional] policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."

This preference derives first from the national labor policy to avoid industrial strife by encouraging collective bargaining. Industrial peace is more likely to be served if the parties themselves work out the terms of their bargaining relationship, than if those terms are dictated from the

outside. Thus, while regulating the process of bargaining, Congress has chosen to leave the outcome primarily to the parties themselves. *See H. K. Porter Co. v. NLRB,* 397 U.S. 99, 102-103, 107-108 (1970).

The policy preference for private resolution also derives from the unique nature of the collective bargaining agreement and the important role that the grievance and arbitration procedure plays in the collective bargaining process. A collective bargaining agreement is not an ordinary contract; it is rather "an effort to erect a system of industrial self-government," *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 580 (1960). *See* Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999, 1004-1005 (1955). Necessarily, the written agreement itself, while establishing the basic framework of the parties' relationship, cannot possibly cover the myriad circumstances that arise in the workplace. "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages." *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 579, *quoting* Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1498-99 (1959).

What must supplement the agreement itself is the "common law of the shop," Cox, *supra,* 72 Harv. L. Rev. at 1499, and the preferred means for establishing that common law is by the parties themselves, either informally or through their grievance and arbitration process. As described by Justice Douglas in *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 581:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means

> of solving the unforeseeable by molding a system of private law for all problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Preferably, the parties themselves should be permitted to perform this interstitial role. They are in a unique position to work out, on a case-by-case basis, arrangements that best serve the overall bargaining relationship, as well as the interests of all employees. Through informal negotiations and give and take, most differences do not even reach the formal grievance stage, and of those that do, nearly all are resolved by the parties themselves. Where the parties cannot work out their own differences, both Congress and the courts have declared their strong preference that these disputes go to arbitrators rather than to judges. *See* Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. 173(d); *United Steelworkers v. American Mfg. Co., supra,* 363 U.S. at 567; *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 581-82; *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596-597 (1960).[3]

Thus, a number of important factors combine to create a strong preference in our national labor policy for the pri-

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3. This preference rests on both expertise and approach. Arbitrators typically are chosen by the parties precisely because of their knowledge of the plant or industry involved and because the parties have confidence that the chosen arbitrator will fill in the gaps of the collective bargaining agreement in an acceptable fashion. Arbitrators, too, can be expected to have greater sensitivity to the consequences of their decisions not only for the ongoing relationship of the parties, but for other employees in the bargaining unit as well. *See United Steelworkers v. American Mfg. Co., supra,* 363 U.S. at 567; *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 580-582.

vate resolution of disputes: The avoidance of industrial strife through encouragement of collective bargaining, the unique nature of collective bargaining agreements, the superior position of the parties to reach settlements that take into account other employees and the parties' overall relationship, and, where the parties cannot resolve the matter, the preference for their chosen arbitrator rather than a court to fill out the collective bargaining agreement. To be sure, the preference for private dispute resolution is not absolute, but it should weigh heavily in the determination of whether and to what extent pursuit of intra-union remedies should be required before resort to the courts. As shown below, to require such pursuit complements the well-established contract exhaustion doctrine, thereby increasing substantially the likelihood of private resolution. Not to do so means that many cases that could have been resolved by the parties themselves, or by their arbitrator, will instead end up in the courts.

B. The Contract Exhaustion Doctrine Promotes Private Resolution of Disputes and Other Important National Labor Policies

To effectuate this preference of our national labor policy for the private resolution of disputes, the courts have developed a contract exhaustion doctrine. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). According to this doctrine, an employee may not bring an action in court for breach of the collective bargaining agreement unless he or she has first exhausted the available remedies under the contract grievance procedure, or is excused from doing so. As a result of this doctrine, most grievances are settled by the parties themselves, a small fraction end up in arbitration, and very few end up in the courts. *See Vaca v. Sipes, supra*, 386 U.S. at 192 n.15.

Central to the successful operation of this process are two important factors: that unions be permitted control over access to arbitration and that they be given broad leeway to reach settlement. As this Court observed in *Vaca v. Sipes, supra,* 386 U.S. at 191:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved.

Accordingly, the exhaustion doctrine generally should be shaped by the importance of promoting responsible union conduct in the handling of contract grievances. To permit the union to be by-passed not only weakens the union, but more significantly weakens and destabilizes the bargaining relationship itself. The preference for private resolution cannot be achieved without responsible union participation in the process.

While the goal of private resolution thus demands responsible union conduct, the contract exhaustion doctrine that serves this goal also promotes important union institutional values in return. "Such activity complements the union's status as exclusive bargaining representatives by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees." *Republic Steel Corp. v. Maddox,* 379

U.S. 650, 653 (1965); *accord, Vaca v. Sipes, supra,* 386 U.S. at 191; *see* Cox, *Rights Under A Labor Agreement,* 69 Harv. L. Rev. 601, 625 (1956). Thus, the goal of private dispute resolution and the relationship between the union and its members cannot be regarded separately. They are mutually dependent.[4]

To achieve industrial peace for all employees, the interests of individuals must on occasion be subordinated. Accordingly, the individual employee has no "absolute right to have his grievance taken to arbitration," *Vaca v. Sipes, supra,* 386 U.S. at 191, even though the grievance may have merit. *See Hines v. Anchor Motor Freight, supra,* 424 U.S. at 570-71. This consequence of the contract exhaustion doctrine is thus part of the broader "collective bargaining system as encouraged by Congress," which, as the Court has observed, "of necessity subordinates the interests of [the] individual employee to the collective interests of all employees in [the] bargaining unit." *Vaca v. Sipes, supra,* 386 U.S. at 182.

While the collective interest requires this subordination, it is of course not without limit. To guard against abuse, the Court has placed upon unions a corresponding duty of fair representation. Thus, where the employee "has been prevented from exhausting his contractual remedies by the

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4. The responsible involvement of the union thus promoted by contract exhaustion also ensures that the collective interests of all employees are respected. Rarely does a dispute affect only the grievant. Precedents are set, and promoting the interests of the grievant may come at unreasonable expense to other employees. Through responsible control of the grievance procedure, the union is able to weigh the competing considerations and strike the balance that best serves the interests of all employees. *See Republic Steel Corp. v. Maddox, supra,* 379 U.S. at 656. To permit this screening process to be circumvented has been recognized as posing a serious threat to industrial peace. *See* Cox, *supra,* 69 Harv. L. Rev. 601, 626-27 (1956). *But see* Summers, *Individual Rights in Collective Agreements and Arbitration,* 37 N.Y.U. L. Rev. 362, 392-95 (1962).

union's *wrongful* refusal to process the grievance," the employee "may seek judicial enforcement of his contractual rights. . . ." *Vaca v. Sipes, supra,* 386 U.S. at 185 (emphasis in original). Even so, however, this exception to contract exhaustion has not been broadly construed. As noted above, it is not sufficient to establish such wrongful refusal that the grievance had merit. *See Hines v. Anchor Motor Freight, supra,* 424 U.S. at 570-71. The employee must show that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes, supra,* 386 U.S. at 190.

In summary, then, the contract exhaustion doctrine serves a number of important and interrelated values. Foremost, it promotes the private resolution of disputes, and does so in a manner that strengthens the effectiveness of the union. Collective bargaining is thereby encouraged and industrial strife avoided. Yet, while benefiting the union, this mechanism for private dispute resolution also demands that the union function responsibly. The union's relationship with its members and the internal procedures which deal with that relationship, therefore, are not without effect upon the union's bargaining relationship with the employer.

While the Court has recognized an exception to contract exhaustion where the union breaches its duty of fair representation, this exception has not been broadly construed. The necessity of union discretion in the handling of grievances and the importance of private dispute resolution weigh too heavily in the balance. These same principles, and others, dictate a like result in the present case. Here, too, what is at issue is the scope to be given exception to contract exhaustion, and here, too, the exception should be construed narrowly. Otherwise, as shown in what follows, the values which underlie and require contract exhaustion will be seriously undermined.

C. Reasonable Pursuit of Intraunion Appeals Complements Contract Exhaustion and Promotes Other Important National Labor Policies

Closely analogous to contract exhaustion is the requirement that union members exhaust their internal union appeals before seeking redress in the courts against their union. Even apart from its relation to contract exhaustion, this doctrine, too, serves important policy goals. By providing unions the opportunity to resolve disputes internally, without judicial interference, it strengthens union democracy and promotes a more stable and responsible bargaining relationship. As Professor Cox has instructed, "Courts and administrative agencies should not interfere in the internal affairs of labor organizations, if union democracy is our goal, until the organization has had a reasonable opportunity to correct any mistakes of subordinate bodies." Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich. L. Rev. 819, 839 (1960). Professor Aaron concurs: "Democratic processes atrophy when they are not exercised; union members will have no interest in improving their organization's internal adjustment procedures if they never are required to use them." Aaron, *The Labor-Management Reporting and Disclosure Act of 1959,* 73 Harv. L. Rev. 851, 869 (1960). *See also* Summers, *The Law of Union Discipline: What the Courts Do In Fact,* 70 Yale L. J. 175, 207 (1960).

Congress has recognized the importance of these values in Section 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4). While restricting the power of unions to limit the right of members to resort to the courts, Congress has provided that the judiciary, in its discretion, may nonetheless require union members "to exhaust reasonable hearing procedures . . . within [the union], before instituting legal or administra-

tive proceedings. . . ." *Id.*[5] Further, to strike a balance between promoting union responsibility on the one hand, while not unduly burdening the individual employee on the other, Congress has limited this exhaustion requirement to four months. *Id.* As such, this limitation represents Congress' judgment that restraint from resort to the courts for up to four months is a reasonable price for the important values promoted by requiring pursuit of intraunion appeals.[6]

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5. In *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968), the Court recognized that the "exhaustion proviso" of Section 101(a)(4) is a rule of judicial administration and stated that the proviso means that "the public tribunals whose aid is invoked *may in their discretion* stay their hands for four months, while the aggrieved party seeks relief within the union." *Id.* at 426 (emphasis added). *See also Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 78 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961). *See generally* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 839 (1960) (intraunion exhaustion is generally a rule of judicial administration).

Although the lower federal courts are divided on the question whether Section 101(a)(4)'s exhaustion proviso is applicable in Section 301 duty of fair representation actions, the majority of cases have applied the statute. *See, e.g., Clayton v. ITT Gilfillan*, 623 F.2d 563, 566 n. 2 (9th Cir. 1980), *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (7th Cir. 1978); *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969) (under Railway Labor Act); *but see Chambers v. Local 639, Int'l. Bhd. of Teamsters*, 578 F.2d 375 (D.C. Cir. 1978). Without regard to whether Section 101(a)(4) is *controlling*, however, it would certainly appear to be the appropriate place for the Court to look for guidance in shaping the rules of judicial administration applicable here to intraunion exhaustion, given the similarity between duty of fair representation claims and the rights secured by Title I of the LMRDA, in which the Section 101(a)(4) exhaustion proviso appears. *See.* 29 U.S.C. § 411(a)(1-5).

6. The lower federal courts also have recognized that deferral to intraunion procedures serves important institutional goals of unions and promotes private dispute resolution within the union appeals process, thereby obviating the necessity of judicial action. *See, e.g., Ruzicka v. General Motors Corp.*, 523 F.2d 306, 311 (6th Cir. 1975); *Imel v. Zohn Mfg. Co.*, 481 F.2d 181, 183 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *Brady v. Trans-World Airlines*, 401 F.2d 87, 104 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).

Ordinarily, pursuit of such appeals is distinct from the exhaustion of contract remedies. The former pertains to internal union affairs, whereas the latter pertains to grievances under the bargaining agreement. Where, however, the union member complains that the union has wrongfully failed to pursue a grievance, the two doctrines become both interrelated and complementary.

This begins at the procedural level. Where the employee brings suit on the collective bargaining agreement, he or she must first excuse non-exhaustion of contract remedies, and most often this is accomplished by showing a breach of the union's duty of fair representation in the handling of the employee's grievance. *See generally* Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 Tex. L. Rev. 1119 (1973); Simpson & Berwick, *Exhaustion of Grievance Procedures and The Individual Employee,* 51 Tex. L. Rev. 1179 (1973). As a result of this "intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts," the complaint against the union becomes a "critical issue" in the action against the employer. *Vaca v. Sipes, supra,* 386 U.S. at 183. Given this intricate relationship between the union issues and the contract issues, there correspondingly results an intricate relationship as well between the exhaustion doctrines applicable to these issues. Neither is without effect upon the other.

Substantively, the interrelationship continues. In what is probably the most frequent case, the union decides not to proceed with a grievance because it appears to lack merit. Where the employee brings suit on this grievance, the union's defense and the employer's defense become substantively interrelated as well. Each asserts in effect that the contract was not breached.

Most important, however, is the interrelationship between contract exhaustion and intraunion exhaustion on the policy level. As noted above, contract exhaustion both promotes and demands responsible union conduct, the primary institutional goal of intraunion exhaustion. Likewise, intraunion exhaustion promotes the goal of contract exhaustion, namely, the private resolution of disputes. Thus, where the employee must appeal a union decision not to pursue the grievance before resorting to court against either the union or the employer, the union has an opportunity, otherwise likely to be lost, first to persuade the employee through fair hearing procedures of the correctness of its action, thus averting litigation. Should the union decide instead that its own action was wrong, private resolution is likely as well, since the employer would be ill-advised not to consider a grievance acknowledged by the union to have been dropped improperly.[7] If the union does not reverse itself, or if the employer nonetheless refuses to settle the grievance or place it back on track in the arbitration procedure, then the employee is free to pursue a judicial remedy. Given a reasonable limitation upon the length of time that intraunion procedures must be pursued, such as the four-month limitation contained in Section 101(a)(4), this opportunity for private resolution will have come at little cost to the employee.[8]

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7. Under such circumstances, an employer is very likely to waive the collective bargaining agreement's time limitations for the processing of grievances and "reinstate" the grievance for resolution under the contract. *See, e.g.*, Barker, *The Employer's Stake in the Union's Duty of Fair Representation: A Form of Liability Without Fault--The Employer's Duty to Police the Handling of Employee Grievances*, in LABOR LAW DEVELOPMENTS 1978, *24th Annual Institute of Southwestern Legal Foundation* 61, 76-77 (1978). The threat of litigation does not provide the only, or even the primary, motive for the employer thus to entertain an untimely grievance. More importantly, the employer must also consider its overall relationship with the union to whom the reconsidered grievance is now likely to have assumed substantial importance.

In summary, where the employee seeks to excuse non-exhaustion of contract remedies on the ground that the union breached its duty of fair representation, there arises an intricate and complementary relationship between contract exhaustion and intraunion exhaustion. Each serves the policy goals of the other; to by-pass either disserves those goals. The two procedures, therefore, should not be viewed in isolation. Instead, limited intraunion exhaustion should be required as a necessary adjunct to contract exhaustion. In particular, where the union decides not to pursue an employee's grievance against the employer, and where the union has an internal procedure for appealing that decision, the employee should not be permitted to go to court against either the union or the employer without first having pursued such an appeal for at least four months.[9] Given the realities of the bargaining place, there is a substantial likelihood that the dispute will be resolved

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8. The adoption of a limited intraunion exhaustion requirement which simply mandates a resort to internal union remedies for a reasonable period (such as four months) prior to the filing of a judicial action would cure a major complaint lodged against the intraunion exhaustion requirement, that the rule sometimes "exhausts" employee-members rather than intraunion remedies. *See, e.g., NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418, 425 (1968); *Dorn v. Meyers Parking Sys.*, 395 F. Supp. 779, 783 (E.D. Pa. 1975).

Certainly, Petitioner Clayton would not have been disadvantaged by a rule that required his pursuit of an intraunion appeal for at least four months before filing suit. The Union withdrew its request to arbitrate Clayton's grievance on July 11, 1975, and Clayton thereafter did not file his duty of fair representation action until February 5, 1976, six months after the union decision not to press his grievance to arbitration. (A.22-23, Petitioner Clayton's Opening Brief at 4.)

9. Exhaustion should, of course, not be required where it would be futile, but this should require a compelling showing, given the importance of the policies involved and the limited nature of the requirement. *See Fizer v. Safeway Stores, Inc.*, 586 F.2d 182, 183 (10th Cir. 1978) (excuse from intraunion exhaustion requires a "clear and positive showing of futility"); *Cf. Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330 (1969) (exception to exhaustion requirement exists where "wholly futile"). Where the union refuses or lacks the procedures to consider the appeal, exhaustion should be excused.

privately during this period, or at least placed back on track in the established grievance and arbitration procedure. If this does not occur, the employee will be free to go to court soon enough.[10]

D. The Decision of the Ninth Circuit Disserves Private Resolution and Other Important National Labor Policies

As demonstrated above, to require a limited but reasonable pursuit of intraunion appeals before any judicial action is brought promotes private resolution of disputes and contributes to democratic and responsible union conduct. By contrast, the rule of the Ninth Circuit disserves each of these goals. That rule would require interunion exhaustion only in two narrow and infrequent circumstances: where the union appeals procedure can formally reinstate the grievance[11] or where the union appeals procedure can

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10. Both the courts and legal commentators have recognized that to require utilization of intraunion procedures has important advantages for the judiciary as well. Professor Summers describes these succinctly: "First, union appellate tribunals may take corrective action, thus reducing the burden of the courts. Second, the benefit of the expert judgment of these tribunals might aid courts in making more responsible decisions." Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L. J. 175, 207 (1960). *Accord* Simpson & Berwick, *Exhaustion of Grievance Procedures and the Industrial Employee*, 51 Tex. L. Rev. 1179, 1217 (1973); *see also Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 79 (2nd Cir.), *cert. denied*, 366 U.S. 929 (1961).

11. In holding that both the employer and the union may properly rely on the exhaustion of internal union remedies' defense in cases where the union appeals process may result in reinstatement of the employee's grivance, the Ninth Circuit expressly recognized that an exhaustion requirement under such circumstances would promote private dispute resolution. *Clayton v. ITT Gilfillan*, 623 F.2d 563, 569 (9th Cir. 1980). Other federal courts have also held that both the union and the employer may exercise an exhaustion defense if the internal union procedures themselves could resolve the grievance, or if resort to the union procedures could get the grievance-arbitration process "back on track." *See, e.g., Varra v. Dillon Companies, Inc*, 615 F.2d 1315, 1317-18 (10th Cir. 1980); *Baldini v. Local 1095, UAW*, 581 F.2d 145, 150 (7th Cir. 1978); *Harrison v. Chrysler Corp.*, 558 F.2d 1273, 1277-79 (7th Cir. 1977); *Orphan v. Furnco Constr. Corp.*, 466 F.2d 795, 800-01 (7th Cir. 1972).

award a court-like remedy. *Clayton v. ITT Gilfillan, supra,* 623 F.2d at 566-69. Further, the Ninth Circuit would apply this rule to the employer and union separately, thus leading to the recognized "anomaly" of the present case where the union is dismissed but the employer is not.[12] *Id.* at 570.

The Ninth Circuit here errs, because it fundamentally misconceives the relationship between intraunion appeals and the contract grievance procedure. Intraunion procedures are not substitutes for either the courts or the contract grievance procedure, and they should not be required

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12. Several other courts also have denied the intraunion exhaustion defense to employers in cases where the defense has been granted to the union. Almost all of these courts have used a "contract analysis" to reach this result, reasoning that the requirement of intraunion exhaustion stems from the union constitution — a "contract" between the union and its members — and that the employer has no "contractual standing" to rely on the exhaustion provisions contained in the union constitution. *See, e.g., Geddes v. Chrysler Corp.,* 608 F.2d 261, 264 (6th Cir. 1979); *Fizer v. Safeway Stores Inc.,* 586 F.2d 182, 184 (10th cir 1978); *Winter v. Local 639, Int'l. Bhd. of Teamsters,* 569 F.2d 146, 150 (D.C. Cir. 1978); *Harrison v. Chrysler Corp.,* 558 F.2d 1273, 1278 (7th Cir. 1977); *Orphan v. Furnco Constr. Corp.,* 466 F.2d 795, 801 (7th Cir. 1972); and *Peterson v. Rath Packing Co.,* 461 F.2d 312, 315 (8th Cir. 1972). This legalistic approach both ignores the effect of such a rule on our national labor policy and fails to account for the fact that exhaustion requirements are in reality rules of judicial administration, available to the courts in their discretion without regard to what the "contract" states. Cox, *supra,* 58 Mich. L. Rev. at 839. Thus, exhaustion of collective bargaining contract remedies is required without regard to whether the agreement so mandates, because the requirement derives not from the "contract" itself but from our national labor policy. The same should hold true of intraunion exhaustion. Further, recognizing the proper basis for intraunion exhaustion would cure a principal objection that many commentators have cited to the contract theory: the disparate impact on union members and non-members. *See, e.g.,* Fox & Sonenthal, *Section 301 and the Exhaustion of Intraunion Appeals: A Misbegotten Marriage,* 128 U. Pa. L. Rev. 989, 1015 (1980); Simpson & Berwick, *supra,* 51 Tex. L. Rev. at 1221. If exhaustion is instead viewed as a rule of judicial administration, no such unfairness results.

to provide the same kind of relief.[13] Rather, their role in this context should be to *facilitate* private resolution, either by the parties themselves or by their chosen arbitrator. As shown above, union appeals can fulfill this facilitator role so long as they have the capacity to address whether the union wrongfully handled the grievance.[14] They do not need to provide relief themselves, nor do they require a formal linkage to the contract grievance procedure, so that a reversal by the union automatically reinstates the grievance. That an appeal may be taken from the union's decision not to pursue the grievance is sufficient to promote the desired goal of private resolution through the other established procedures. If such resolution is not forthcoming in a reasonable time (and this is why it need not be guaranteed),

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13. The decision of this Court in *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968) is not to the contrary. There the Court held that a union may not discipline a member for filing an unfair labor practice charge with the NLRB prior to exhausting internal union remedies, because, among other reasons, such internal union procedures were "plainly inadequate" for dealing with the public-policy matters involved there, which went "beyond the internal affairs of the union." *Id.*, at 425, 426 n. 8. While breach-of-contract/unfair-representation cases likewise raise issues that go beyond the internal affairs of the union, they do so in a manner that argues in favor of exhaustion not against, since the purpose of exhaustion here is not to provide relief in lieu of that from other forums, but rather to channel the disputes to the forum in which they ought to be decided. Thus, in consideration of the relevant policy goals, the "adequacy" of the intraunion procedures in the present context should be measured according to their capacity to promote private resolution by the parties or their arbitrator, and not according to whether they can provide the desired relief directly. By this measure, as shown above, an intraunion procedure with the capacity to entertain an appeal from the decision not to pursue the grievance is "adequate".

14. Conversely, where the union appeals procedure cannot address whether the grievance was properly handled, the limited exhaustion requirement suggested herein should not apply. For example, the requirement should not apply "in situations where the intraunion remedies provide for discipline but not for vindication and reversal of the allegedly improper decision." *Neipert v. Arthur G. McKee & Co.*, 448 F. Supp. 206, 210 (E.D. Pa. 1978). *See also Orphan v. Furnco Constr. Corp.*, 466 F.2d 795, 801-02 (7th Cir. 1972).

then the employee is free to go to the courts, without having suffered prejudicial delay.[15]

Beyond being unnecessary to promote private resolution of disputes, the strictures placed upon intraunion procedures by the Ninth Circuit actually disserve that goal. Very few intraunion procedures would satisfy either of the Ninth Circuit's criteria to qualify for exhaustion.[16] As a consequence, the potential for private resolution present in those procedures that can address whether the grievance wrongfully was dropped, but can neither award court-like relief nor guarantee reinstatement of the grievance, would be lost. Those cases would go instead to the courts, despite the consensus that judicial construction of bargaining agreements should be the exception and not the rule. Similarly, the potential for promoting union responsibility present in this larger class of intraunion procedures would also be lost. As a result, not only would union members lose the potential for more democratic procedures, but the bargaining relationship itself, importantly dependent upon responsible union conduct, would suffer as well.

Further, to permit any such criteria to apply to the union or employer independently of the other creates an actual disincentive for private resolution. Thus, as in the present case, where independent application of the criteria results in dismissal of the union but not the employer, the employee

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15. Just as the relief available from the intraunion procedure need not be court-like in order to promote private resolution, so too there is no need that the entire procedure be completed within the four-month period. That even the first step of the appeal can be taken during this period should be sufficient. Further, where the intraunion procedure *can* lead itself to complete relief, a court in its exercise of discretion might reasonably require that the procedures be pursued to completion rather than just for four months.

16. A review of the relevant case law has failed to disclose that any union appeals process other than that of the UAW provides for the award of money damages to compensate a member for the union's breach of the duty of fair representation.

may be well advised not to pursue intraunion appeals at all. If the employee does not, the union will be relieved of liability and out of the case. The action against the employer then becomes substantially easier to maintain, because on the key and threshold issue of the breach of the duty of fai representation, the union is not required to defend itself. Instead, it is the employer that must defend what the union has done, with neither firsthand access to the evidence nor incentive for the union to cooperate. As a consequence, the employee stands to gain a decided advantage in court by deliberately not pursuing the intraunion appeal, an outcome clearly counter to the policies supporting both intraunion and contract exhaustion.[17]

For all these reasons, then, the decision of the Ninth Circuit should be rejected. In shaping its exhaustion rule, the Ninth Circuit has failed to take properly into account the structure of our national labor policy, just as it has failed to appreciate the contribution that intraunion exhaustion can make to the important goal of private resolution of disputes. As a consequence, it unnecessarily restricts resort to intraunion procedures and does so in a manner that actually disserves these goals of our national policy. In place of this restrictive rule, *Amicus* respectfully urges the Court to require, as a precondition to suit against either the employer or the union, the reasonable pursuit (for up to four months) of intraunion appeals wherever such procedures have the capacity to address the union's handling of

17. Moreover, allowing the union, but not the employer, the ability to claim an exhaustion defense raises a disturbing potential for collusion between the member-employee and the union. The member will be encouraged to sue only the employer and to forego filing an intraunion appeal in return for the union's assistance (or lack of opposition) in regard to establishing a breach of the union's duty of fair representation. Such arrangements appear entirely plausible because the union would not face any potential liability, even if named as a defendant, due to its exhaustion defense.

the grievance.[18] Given the effect upon the overall bargaining relationship, the importance of private resolution, the limited burden this rule places upon the employee, and the potential cost to stable labor relations of the alternative, no less than this should be required before permitting the courts to intervene in the collective bargaining relationship.

Application of the suggested rule to the facts of this case should result in the dismissal of *both* of Clayton's actions — that against the Union *and* that against the Company. The UAW procedure clearly had the capacity to address whether the grievance was wrongfully dropped. Clayton was not only familiar with this procedure generally but was notified of it specifically at the time the Union decided not to pursue his grievance. There is no showing that pursuit of the appeal would have been futile. Accordingly, having failed even to attempt the use of procedures that could have led to the resolution of his claim privately, he should not now be permitted to pursue his claim in court.

E. Failure to Pursue Intraunion Remedies Should Be a Defense for Both the Union and the Employer or For Neither

As demonstrated above, reasonable pursuit of intraunion appeals should be a prerequisite to suit against either the employer or the union. If, however, the Court should conclude that failure to pursue such appeals is not a defense available to the employer, then *Amicus* respectfully urges that the defense should not be available at all.

As the Court observed in *Vaca v. Sipes, supra,* 386 U.S. at 197, employers and unions "probably should" both be joined as defendants in fair representation/Section 301 actions. The issues as to the union and the employer are

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18. Where the employer and the union have agreed that a reversal by the union on appeal automatically reinstates the grievance, the four-month limitation would not apply, because in that case the intraunion procedures are in actuality part of the contract grievance-arbitration procedure itself, which of course is not subject to the four-month limitation. Similiarly, even in the absence of a formal mechanism allowing reinstatement of the grievance, if the union and the employer agree in a particular case to reinstate the grievance

intricately related (breach of the union's duty of fair representation being an essential element in the breach of contract action against the employer), *Id.*, at 183, and damages are to be apportioned according to "the fault of each," *Id.*, at 197. While *Amicus* takes no position as to whether this interrelation of issues and damages makes either party indispensible to an action against the other,[19] at a minimum it should be taken into account in determining the scope to be given the intraunion exhaustion requirement, which, as noted above, is at base a rule of judicial administration.

Included in this determination as well should of course be the effect of the rule upon the private resolution of disputes. As pointed out above, where the union may rely on the defense of failure to exhaust but the employer may not, there arises an incentive to by-pass both the intraunion *and*

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within four months of the initiation of the member's intraunion appeal, that, too, should preclude resort to the courts.

19. Several federal courts have held that a union is an "indispensable party" under Fed. R. Civ. P. 19 in a duty of fair representation action under Section 301. *Bradley v. Ford Motor Co.*, 417 F. Supp. 23 (N.D. Ill. 1975); *Kinnunnen v. American Motors Corp.*, 56 F.R.D. 102 (E.D. Wis. 1972); *but see Kaiser v. Local 83, Int'l Bhd. of Teamsters*, 577 F.2d 642 (9th Cir. 1978) (*per curiam*); *Serra v. Pepsi-Cola General Bottlers, Inc.*, 248 F. Supp. 684 (N.D. Ill. 1965). *See also* Fox & Sonenthal, *supra*, 128 U. Pa. L. Rev. at 1013, n.85.

Three important rationales support a conclusion that unions are indispensable parties in duty of fair representation cases. First, a duty of fair representation judgment frequently has an impact upon non-party union members and the union's presence in such cases as a party defendant is necessary to safeguard the interests of non-party members. For example, reinstatement of a plaintiff in a wrongful discharge action would affect the seniority status of non-party employees. *See, e.g., Bradley v. Ford Motor Co., supra*, 417 F. Supp. at 25. Second, if the union is a party to the suit, the union can aid the court in the interpretation of the collective bargaining agreement. *Kinnunnen v. American Motors Corp., supra*, 56 F.R.D. at 104; *Johnson v. Colts, Inc.*, 306 F. Supp. 1076 (D. Conn. 1969). Third, courts have recognized that requiring the employer to litigate a duty of fair representation action without the union as a co-defendant is unduly prejudicial and unfair to the employer. *See, e.g., Atwood v. Pacific Maritime Ass'n.*, 432 F. Supp. 491, 493 (D. Ore. 1977).

the contract grievance procedures, resulting in more cases going to the courts rather than being resolved by the parties or their arbitrator as they should be. Further, there also results from dismissal of unions but not employers manifest unfairness. The employer in such a situation is required to defend the *union's* conduct, yet the employer has neither first-hand access to the evidence nor is there any incentive for the union to cooperate.

For all these reasons then -- the interrelation of the issues, the apportionment of damages, the effect on private resolution, and the resulting unfairness to employers, the Court should reject as a matter of sound judicial administration any exhaustion rule which results in dismissing one party but not the other from this kind of action. Accordingly, if the failure to pursue intraunion remedies is not to be an available defense to *both* unions and employers, as *Amicus* submits it should, then it should be available to neither.

IV.
CONCLUSION

For the reasons set forth above, *Amicus* respectfully submits that the judgment of the court of appeals with regard to ITT be reversed and with regard to the UAW be affirmed.

Respectfully submitted,

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